LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 20 1968
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1968

No. ~~1247~~ 1248

HESMER FOODS, INC.,
Petitioner

— vs. —

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Harry P. Dees,
305 Union Federal Building
Evansville, Indiana,
Attorney for Petitioner.

Harry P. Dees,
Arthur R. Donovan,
Joseph A. Yocum,
Kahn, Dees, Donovan & Kahn,
305 Union Federal Building,
Evansville, Indiana,
Of Counsel.

UNIGRAPHIC, INC., 4400 JACKSON AVE., EVANSVILLE, IND., PHONE 476-7752

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	4
Statement	9
Reason for Granting the Writ	10
An Important Federal Question is Presented by the Proceedings Below as a Matter of Law Concerning the Burden of Proof the National Labor Relations Board Must Sustain in Establishing a Violation of the Labor-Management Relations Act Because of the Board's Gross Misapprehension and Gross Misapplication of the Substantial Evidence Test.	
Conclusion	16

CASES CITED

Georgia, Southern & Florida Railway Company v. Perry, 326 F. 2d 921 (CCA-5 1964) 12

Indiana Metal Products Corp. v. N.L.R.B. 202 F. 2d 613 (CCA-7 1953) 15

N.L.R.B. v. Brown, 380 U.S. 300, 85 S.Ct. 980, 13 L. Ed. 2d 855 (1965), 380 U.S. 291, 92, 85 S.Ct. 988 11

N.L.R.B. 2 v. Combined Century Theatres, Inc., 278 F. 2d 306, 308-06 (CCA-2 1960) 12

N.L.R.B. v. Illinois Tool Works, 119 F 2d 356, 360 (CCA-7 1945) 13

N.L.R.B. v Joseph Antell, Inc. 358 F 2d 880, 882, (CCA-1 1966) 13

N.L.R.B. v. Robert Alvaro Manufacturing Co., Inc., 327 F 2d 998, 999 (CCA-1 1964) 13

N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404 82 S.Ct. 853, 855-56, 16 L. Ed. 2d 141 (1962) 3, 11

N.L.R.B. v. Wix Corporation, 309 F 2d 826, 832, fn. 6 (CCA-4 1962) 12

Pittsburgh S.C. Co. v. N.L.R.B., 180 F 2d 731, 735, 340 U.S. 498, 71 S.Ct. 453, 95 L. Ed. 479 (CA 6).... 14

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 487, 71 S.Ct. 456, 464, 95 L. Ed. 456 (1950) 11, 5

TEXTS

Section 8(a) (1) and (3), of the Labor-Management Relations Act, 29 U.S.C. 158(a) (1) and (3), 61 Stat. 140 4

Section 8(c) of the Labor-Management Relations Act, 29 U.S.C. 158(c) 61 Stat. 140 5

Section 10(c)(e) of the Labor-Management Relations Act, 29 U.S.C. 160(c)(e), 61 Stat. 146 5

316 J.S. "Evidence" S15 bc, p 860; Amd., 70 A.L.R. 1326 12

48 Cornell L.Q. "Substantial Evidence Test" 309, 316 (1963) 11

In The

Supreme Court of the United States

October Term, 1968

No. .....

HESMER FOODS, INC.,

Petitioner

— vs. —

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Hesmer Foods, Inc., prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit, granting enforcement of an order of the National Labor Relations Board without an opinion stating the grounds for granting enforcement.

OPINIONS BELOW

The Court of Appeals for the Seventh Circuit rendered no opinion as such in this case, but rather on November 17, 1967 made the following entry:

"This court having considered the record in

> this case transmitted by the National Labor Relations Board, as well as the briefs filed by the respective parties herein, and having heard oral arguments in open court by counsel for said parties, and having taken the case under advisement for decision, the court has conferred thereon and is now of the opinion and accordingly holds and adjudges that the order of the National Labor Relations Board issued on October 26, 1965 against Hesmer Foods, Inc., respondent, be enforced in full and that a decree accordingly be entered herein."

On the basis of this entry a decree was issued December 20, 1967 and subsequent to that date a petition to stay the mandate was timely filed and this petition is filed pursuant thereto. The Decision and Order of the National Labor Relations Board appears in the Record. (R.J.A. 1-21)

JURISDICTION

The Jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code.

QUESTION PRESENTED

Whether the Court below was correct in finding that Petitioner violated Section 8(a)(1) of the Labor-Management Relations Act and Section 8(a)(3) of the Labor Management Relations Act, where the National Board's opinion (the sole and only opinion in this case) was based on the following inferences:

(1) Because Petitioner runs a small plant it

knew of union activity and was motivated at all times by unlawful motive;

(2) Because Petitioner failed to call a witness it made available to the parties, an inference was raised that if this witness testified it would be unfavorable to Petitioner;

(3) The use of the term "agitator" by Petitioner raised an inference of knowledge of union activity and unlawful motive;

(4) Petitioner's use of two letters written over two months after the events, an issue not alleged to be unlawful, raised an inference of unlawful motive;

(5) Petitioner's showing, through its own witnesses and those of the Board, that its motive concerned the anti-negro feeling of 5 of its employees did nothing to rebutt the above inferences.

(6) Based on the above inferences and refusal to discuss the effect of Petitioner's defense, the Board found its General Counsel had proven a violation of the Act by a preponderance of the evidence in the first instance and by substantial evidence on the record considered as a whole.

Because of the above, a substantial federal question is raised as to whether or not, as a matter of law, the substantial evidence test has been "misapprehended or grossly misapplied" by the Board in this case. **Universal Camera Corporation** v. **N.L.R.B.**, 340 U.S. 474, 491, 71 S.Ct. 456, 466, 95 L.Ed. 456(1950); **N.L.R.B.** v. **Walton Mfg. Co.**, 369 U.S. 404, 408, 82 S.Ct. 853, 855-56, 16 L.Ed.2d 141(1962).

STATUTE INVOLVED

Section 8(a)(1) and (3) of the Labor-Management Relations Act, 29 U.S.C 158(a)(1) and (3), 61 Stat. 140 provides as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor

organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or rtaining membership;

Section 8(c) of the Labor-Management Relations Act, 29 U.S.C. 158(c), 61 Stat. 140 provides as follows:

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Section 10(c)(e) of the Labor-Management Relations Act, 29 U.S.C. 160(c),(e), 61 Stat. 146, provides as follows:

(c) The testimony take by such member, agent, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Boaord shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor

practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complain has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, of the payment to him of any back pay(if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners there-

of, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(e) The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provoided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or ganecy, shall be considered by the court, unless the failure or neglect to urge

such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the saitsfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

STATEMENT.

Hesmer Foods, Inc. is a food processing firm located in Evansville, Indiana. The company has two plants in that city, one located on North Stockwell Road and the other on Stringtown Road. The events involved in this case took place at the Stockwell Road plant, which produces barbecue products distributed under the Hesmer label. (R.J.A. 2, 48) During the first part of October, 1965 a union organization campaign began among Petitioner's employees. (R.J.A. 2, 45-6) Prior to this time, or during the month of September, 1965, Petitioner became concerned about the fact that it had failed to ever employ any negroes at its Stockwell Road plant as it felt might be required by the federal Civil Rights Act. (R.J.A. 82) As part of program designed to cure this problem, Petitioner decided to hire negroes at the Stockwell Road plant. With this in mind it decided to bring two negroes to work at its plant on October 14, 1965 and this, in fact, was done. (R.J.A. 89)

On the evening of October 11, 1965 Petitioner's president had occasion to be passing through the Stockwell Road plant when an employee approached him concerning this question: "Do we have to hire niggers here at Hesmer's?" (R.J.A. 83) After some conversation, this employee told Petitioner's president that another employee would place a sign on the restroom door "Niggers not wanted," if Petitioner hired negroes. (R.J.A. 83) This employee also stated three or four other employees of Petitioner held similar views. (R.J.A. 75) As a result of this disclosure, Petitioner's president held a meeting with his supervision and a decision was made to discharge the employees management felt might cause trouble because of the planned

integration of the Stockwell Road plant. The final decision, however, was made in one instance by Petioner prior to the time of the other discharges. (R.J.A. 84-5) This was done and this proceeding was instituted, although approximately two months after these events Petitioner did send two letters to its employees stating opposition to organization by a union—these letters were not alleged to be violations of the Act. (R.J.A. 27-29)

The Board affirmed its Trial Examiner's Decision without comment. In turn, this Decision rested on the propositions that because Petitioner ran a small plant, it had failed to call a witness, its president had used the term "agitator" at the time of one of the discharges, had written letters to its employees showing opposition to unionization two months after the discharges and regardless of Petitioner's stated cause for the discharges of strong race prejudice that Petitioner had fired five of its employees in violation of Section 8(a)(3) of the Labor-Management Relations Act. (R.J.A. 1-16) Petitioner filed exceptions to this Decision which was adopted in its entirety by the National Labor Relations Board. Later, the Board filed a petition for enforcement of its order and this petition was granted on the basis of the entry set forth above.

REASON FOR GRANTING THE WRIT.

An Important Federal Question is Presented by the Proceedings Below as a Matter of Law Concerning the Burden of Proof the National Labor Relations Board Must Sustain in Establishing a Violation of the Labor-Management Relations Act Because of the Board's

Gross Misapprehension and Gross Misapplication of the Substantial Evidence Test.

It is quite clear that in the usual case, inferences and questions of credibility should be left to either the National Labor Relations Board or one of its Trial Examiners or trial judges, since it is not the role of the courts to supplant the functions of an administrative agency such as the National Labor Relations Board. However, even though only a few cases turn on such question, "when obvious injustice has been done, a court can turn grossly erroneous fact inferences into errors of law. The court thereby removes the issue from the area of administrative discretion. The elusive nature of the substantial evidence test is necessaray in order to permit the court to correct a real injustice." 48 CORNELL L. Q., "Substantial Evidence Test," 309, 316(1963) dealing with the application of **Universal Camera Corporation** v. **N.L.R.B.,** 340 U.S. 474,71, S.Ct. 456,95 L.Ed. 456(1960); **N.L.R.B.** v. **Walton Mfg. Co.,** 369 U.S. 404,82 S.Ct. 853,16 L.Ed.2d 141(1962). It is, thus, Petitioner's position that in this case the Board acted in an unreasonable fashion in that its inference was both unreasonable and contrary to fact to such a degree as to be "grossly erroneous." Similarly, the Circuit Court acted in a manner contrary to the directions of this Court in **N.L.R.B.** v.**Brown,** 380 U.S. 300, 85 S.Ct. 980, 13 L.Ed.2d 855(1965) wherein it was stated at 380 U.S. 291,92, 85 S.Ct. 988: "Reviewing courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

What, then, is clearly unreasonable or grossly erroneous about the Board's decision in this case. In its

decision the Board in adopting its trial examiner's findings in their entirety found that because Petitioner failed to call one of its supervisors the testimony given by that supervisor would have been unfavorable to its position. This is much emphasized. (R.J.A. 10-12) The record without contradiction, however, shows no reason for the application of the rule involved in such cases, which is that where the failure of a witness to testify is unexplained and the witness is not made available to the parties, an inference arises against the party failing to call or make the witness available that his testimony would be unfavorable. The portion of the record removing the proper use of this inference from the case is as follows: "Trial Examiner: 'Was Mr. Johann here earlier in the day? Mr. Yocum: Yes, he was. Trial Examiner: Is he here now? Mr. Yocum: I don't believe he is. Trial Examiner: All right. You aren't calling him? Mr. Yocum: No. But we would make him available." (R.J.A. 99) Unless it is the policy of the Board to apply an inference where the basis for its application does not exist it would seem clear it cannot have benefits of this inference in this case. **N.L.R.B.** v. **Wix Corporation,** 309 F.2d 826, 832, fn. 6(CCA-4 1962); **N.L.R.B.** v.**Combined Century Theatres, Inc.,** 278 F.2d. 306, 308-06 (CCA-2 1960) In any event, all this man could testify to would merely be cumulative and no unfavorable inferences can be drawn under such circumstances. **Georgia Southern & Florida Railway Company** v. **Perry,** 326 F.2d 921 (CCA-5-1964); and where properly applied this reference is no substitute for evidence; nor does it shift the burden of proof. 316 J.S., "Evidence," S15 bc. p 860; Amd., 70 R.L.R. 1326.

Similarly, the Board inferred knowledge of union activity and imporper motive from the fact that Peti-

tioner runs a small plant. Of course, this is obviously inference upon inference—knowledge of necessity results in unlawful motive—yet most importantly nothing else in the record supports this directly and, in fact, as this Court judicially knows, Evansville, Indiana is a city of approximately 148,000 people. The so-called small plant rule only applies where an employer operates a small plant in a small community where "other affirmative evidence" directly shows the employer in fact knows of the union activity of his employees. **N.L.R.B.** v. **Joseph Antell, Inc.,** 358 F.2d 880, 882(CCA-1 1966); **N.L.R.B.** v. **Robert Alvaro Manufacturing, Inc.,** 327 F.2d 998, 999(CCA-1 1964; **N.L.R.B.** v. **Illinois Tool Works,** 119 F.2d 356, 360(CCA-7 1945). The record also shows no basis for application of the small plant rule. Although discredited, Petitioner's president directly denied such knowledge. (R.J.A. 96) At the time of the discharges in issue in this case and before, Petitioner never received any form of direct communication from the union attempting to organize its employees, all union activity was covert in the sense no buttons, insignia, etc., were worn by Petitioner's employees and there is no evidence of any direct mention of union activities to employees by any person in a responsible position with Petitioner. (R.J.A. 41, 45, 56-7,63,87)

Next, the Board found that Petitioner's use of the word "agitator" at the time of the discharge of one of he alleged discriminatees was enough to raise an inference of unlawful motive. This, however, assumes there is nothing in the record rebutting this inference, yet this is not the case. The specific finding is itself most equivocal: "The term 'agitator' appears to have referred to Bunker's (one of the alleged discrimi-

natees) union activity." (R.J.A. 15) The record affirmatively shows the use of this term in fact does not relate to union activity but to Petitioner's knowledge of this man's strong racial prejudice: "Isn't it true that of his man's strong racial prejudice: "Isn't is true that you said that Bunker was going to put a sign on the restroom door, 'No niggers allowed in here?' A. Yes, I did." (R.J.A. 75) How can an inference out of nothing be reasonable, when the record without contradiction and affirmatively shows a reasonable basis for the use of the term which is lawful.

As a means of raising an inference of unlawful motivation on the part of Petitioner, the Board found two letters sent to its employees over two months after the date of the discharges indicated unlawful motive or hostility on the part of Petitioner. (R.J.A. 27-29) After Respondent objected to the introduction of these documents into evidence on the ground they could not be used as evidence because they were not alleged to be violative of the Act and, thus, could not be used for this purpose, these statements were admitted into evidence. This was improper because:

> "In **Pittsburgh S. C. Co. v. N.L.R.B.**, 180 F.2d 731, 735 affirmed 340 U.S. 498, 71 SCt. 453, 95 L.Ed. 479(C.A. 6) the Court of Appeals, under somewhat similar circumstances stated With reference to the right of free speech the legislative history of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor

practices'." **Indiana Metal Products Corp.** v. **N.L.R.B.**, 202 F.2d 613 (CCA-7 1953)

As the Board's own brief before the Court of Appeals shows, it has admitted that the findings as to unlawful motive are negative, in that they rest solely on disbelief, not affirmative evidence. (R.B.B. 18, fn. 16).

The law is clear to the effect that in testing either the substantiality of the Board's decision or the preponderance of the evidence found by one of its Trial Examiners the following must be considered:

> "Whether or not it was ever permissable for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory or review and bars its practice." **Universal Camera Corp.** v. **N.L.R.B.**, 340 U.S. 474, 487,71 S.Ct. 456, 464,95 L.Ed. 456(1950).

The Board ignored the evidence in the record showing the five discharges were not motivated by anti-union considerations. The record shows Petitioner's decision to hire negroes was made prior to the advent of any union activity among its employees. (R.J.A. 35) The record also shows the consideration was racial prejudice among a few of Petitioner's employees and the effect it might have when two negroes were brought into the plant. (R.J.A. 74-5) Ultimately, all that is left of the Board's decision is a finding that a dispropor-

tionate number of union adherents were chosen for discharge, yet when considered in light of the fact that Petitioner's total employment compliment at both plants was approximately 60 this is just not supported by the entire record. (Compare R.J.A. 12 with R.J.A. 80)

CONCLUSION

For these reasons Petitioner asks that this Court grant its petition for a writ of certiorari and for all proper relief.

Respectfully submitted,

HARRY P. DEES
305 Union Federal Building
Evansville, Indiana,
Attorney for Petitioner.

HARRY P. DEES,
ARTHUR R. DONOVAN,
JOSEPH A. YOCUM,
KAHN, DEES, DONOVAN & KAHN
305 Union Federal Building
Evansville, Indiana,
Of Counsel